

Opinion No. 65-229

November 30, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Representative Thomas W. Hoover, 8524 Las Camas Road, N.E., Albuquerque, New Mexico and Representative, John B. Mattson, Jr., 2132 Utah, N.E., Albuquerque, New Mexico

QUESTION

QUESTIONS

1. Is a member of the legislature who is on a retainer for lobbying purposes, or being otherwise compensated during the legislative session by a union, business or other special interest, prohibited from participating in committee deliberations of, from urging passage or defeat of, and from voting on legislation directly affecting the person or persons paying the retainer or compensation?
2. Do Sections 28 and 39 of Article IV apply to the lieutenant governor?
3. Who has the responsibility to insure that legislators do not violate Article IV, Section 28 and Article IV, Section 39?

CONCLUSIONS

1. See analysis.
2. No.
3. See analysis.

OPINION

{*375} ANALYSIS

Article IV, Section 39, New Mexico Constitution provides as follows:

"Any member of the legislature who shall vote or use his influence for or against any matter pending in either house in consideration of any money, thing of value, or promise thereof, shall be deemed guilty of bribery, and any member of the legislature or other person who shall directly or indirectly offer, give or promise any money, thing of value, privilege or personal advantage, to any member of the legislature to influence him to vote or work for or against any matter pending in either house; or any member of the

legislature who shall solicit from any person or corporation any money, thing of value or personal advantage for his vote or influence as such member shall be deemed guilty of solicitation of bribery."

Examination of this provision establishes that it covers three types of activity, namely, (1) a legislator voting or using his influence for or against any pending legislation in consideration of any money, thing of value, or promise thereof, (2) any legislator or other person who offers, gives or promises to give any thing of value to a member of the legislature to influence him to vote or work for or against any pending legislation, and (3) any legislator who solicits any thing of value for his vote or influence.

This constitutional provision was before our Supreme Court in the case of **State v. Lucero**, 20 N.M. 55 although only the third activity mentioned above was involved. The Court did note that the first two types of prohibited activity require that the matter be "pending" in either house of the legislature, while the last type does not so require.

The way your question is phrased it presupposes that the matter is pending since otherwise there is no specific bill which the {*376} legislator could urge passage or defeat of.

If the legislator is a paid lobbyist on retainer he would, in all probability, be precluded from voting on or in any way using his influence for or against any pending legislation which directly affects the person or persons paying the retainer -- this for the reason that it could be reasonably assumed his action was motivated by the retainer.

The second portion of your first question, i.e., a legislator being compensated during the session by some industry, business, union or other interest group is extremely troublesome. It cannot be answered in a black - white manner. There could be too many variations in the facts. Each situation would have to be examined individually, and a violation would have to be proved by competent evidence.

If the particular legislator is compensated by the particular interest group only during the legislative session, it would seem that we have a paid lobbyist situation. However, some legislators may receive compensation from a particular industry, business, union or other interest in the course of their employment and such interests may be directly affected by pending legislation. The legislator's occupation, profession or trade may be with and involve one such group. If such is the case, the problem of proving a violation of Article IV, Section 39 becomes formidable. It would have to be proved that the legislator voted or used his influence for or against any pending matter "in consideration" of the compensation. Since a violation of Article IV, Section 39 is a felony, the proof would have to be beyond a reasonable doubt.

In your second question you ask whether a lieutenant governor is included within the scope of Article IV, Section 39, as well as Article IV, Section 28. We conclude that he is not. Both of the sections in question speak of members of the legislature. While the lieutenant governor does preside over the senate, he is not a member of the legislative

branch of government; rather he is specifically listed in the constitution as a member of the executive department of state governors. He runs jointly with the governor and succeeds to the latter office in the event of a vacancy.

Lastly you ask who has the responsibility to insure that legislators do not violate Article IV, Section 28 and Article IV, Section 39.

We would refer you first to Article IV, Sections 35 and 36. The latter provides that all state officers are subject to impeachment "for crimes, misdemeanors and malfeasance in office." It might well be that the legislature, which has the sole power of impeachment and trial thereof, will be in the best position to know whether a legislator has violated either Section 28 or 39 of Article IV. Accordingly, the impeachment route could be used.

You will note that article IV, Section 28 prohibits any member of the legislature during the term for which he was elected and for one year thereafter from being interested directly or indirectly in any contract with the state or municipality which was authorized by any law passed during such term. You will also notice that while such acts are prohibited, they are not made a criminal offense. We would think therefore that the execution of such a contract could be enjoined by any party having legal standing. If, however, the contract had already been entered into, the appropriate procedure would be to bring a civil action to invalidate the contract. In the case of **State of N.M. v. State Highway Commission**, 38 N.M. 482 35 P. 2d 308, the procedure used was a writ of mandamus seeking to require that the contractual terms be complied with. Finding no violation of Article IV, Section 28 the Court required enforcement {377} of the contract.

We have a different situation with regard to Article IV, Section 39. Section 40 of Article IV makes the violation of Section 39 a felony. Only in limited instances will the courts enjoin the commission of a crime. Where necessary to protect property and property rights from irreparable injury, the courts will issue an injunction even though the acts to be enjoined are criminal offenses. **La Mesa Community Ditch v. Appelzoeller**, 19 N.M. 75, 140 Pac. 1051; **Simon v. Gallegos**, 44 N.M. 127, 99 P. 2d 451; **State v. Robertson**, 63 N.M. 74, 313 P. 2d 342.

Although the case is not entirely in point, there is language in the decision of **State v. Davis**, 65 N.M. 128, 333 P.2d 613 indicating that the courts have the power to grant injunctive relief for the protection of **public rights**, property, safety, and welfare where the act complained of constitutes a crime. Thus it might be that our courts would enjoin a violation of Article IV, Section 39.

However, you ask how it can be insured that a legislator will not violate this section. The answer is that it can never be assured that any person, legislator or otherwise, will not commit a crime. Bribery and solicitation of bribery which the violation of Article IV, Section 39 constitute, are secretive crimes which usually come to light, if at all, after the offense has been committed.

It is the duty of the district attorney to prosecute all criminal cases for the State. Section 17-1-11, N.M.S.A., 1953 Compilation. If he fails or refuses to do so, the attorney general is authorized to act on behalf of the state if after a thorough investigation such action is ascertained to be advisable. Section 4-3-3, N.M.S.A., 1953 Compilation.